STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN COLUMBUS FEDERAL CREDIT UNION,

Plaintiff-Appellant,

v

MADISON NATIONAL LIFE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
March 20, 2007

No. 272725
Wayne Circuit Court
LC No. 05-525495-CK

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of its breach of contract claim. We affirm but remand for further proceedings consistent with this opinion.

This case involves a group credit life insurance policy that was issued on the life of Thomas Busdeker in conjunction with his purchase of a mobile home through a loan Busdeker obtained from plaintiff. Under the terms of the life insurance policy, if Busdeker died prior to the balance on the mobile home loan being paid, plaintiff was to be paid the balance of the loan as the beneficiary of the life insurance policy. In fact, Busdeker did die on November 30, 2004, before the mobile home loan was paid off, but defendant refused to pay plaintiff's claim for the balance of the loan consistent with the terms of the life insurance policy that defendant issued.

Thereafter, plaintiff brought this breach of contract action. Defendant responded to plaintiff's complaint, averring that the terms and conditions of the life insurance policy were not met. Specifically, defendant claimed that the insurance policy terminated when Busdeker, before his death, became three months delinquent in his repayment of the mobile home loan. Further, defendant claimed, because Busdeker refinanced the mobile home loan, the policy terminated at the time of the refinance, as provided by the terms of the life insurance policy.

Subsequently, defendant moved to summarily dismiss the case pursuant to MCR 2.116(C)(10). Defendant indicated that in January of 1998, plaintiff financed a loan to Busdeker with terms that included 84 payments of $479.61 on the 20th of each month, and one balloon payment, on February 20, 2005, of $30,350.08. Defendant claimed that Busdeker was late on a majority of the loan payments, including (1) in 2000, he made nine late payments, and only 11 out of 12 payments were paid; (2) in 2001, all of his payments were late, and only 11 out of 12

payments were paid; (3) in 2002, he made three late payments, and only 11 out of 12 payments were paid; (4) in 2003, he made five late payments, and only 11 out of 12 payments were paid; and (5) in 2004, he made seven late payments, and only 11.8 payments out of 12 were paid.

Further, defendant argued, in April of 2002, plaintiff lowered the loan payments to $425 a month and changed the due date to the 30th of each month via an "Extension Agreement," which changed the terms of the initial loan and purportedly forgave the late fees and interest that had accrued to that date. Thus, when Busdeker died, he owed $38,852.33 in principal on the loan, instead of only three more payments and the amount of the balloon payment. And, defendant claimed, Busdeker was more than three months late in making his February 2004 payment because it was paid on June 14, 2004, thus, the policy was terminated on June 30, 2004. Accordingly, because the life insurance policy provided that it terminated either upon refinancing the loan or when the debtor was three months delinquent in loan payments, defendant argued that there was no genuine issue of material fact that it did not breach its contract by failing to pay plaintiff's claim.

Plaintiff responded to defendant's motion for summary dismissal, arguing first that defendant never notified Busdeker or his wife that the life insurance policy was terminated but, in fact, continued to accept premium payments for the coverage even during this litigation. Second, plaintiff argued that the loan was not refinanced or renewed, but merely extended for three months at the end. Third, plaintiff argued that the mobile home loan was not in arrearage but, even if it was, there was no material breach of contract. Further, plaintiff claimed that the life insurance policy was ambiguous because the "When Insurance Stops" provision was contradicted by the "Termination" provision of the policy in that the latter required that a 30 day written notice be given before the policy was cancelled and no such notice was given in this case. Therefore, plaintiff argued, there were substantial genuine issues of material fact that prevented the granting of defendant's motion for summary dismissal.

Defendant responded to plaintiff's arguments, claiming that (1) the plain meaning of the word "renew" is "to grant or obtain extension of" according to *Webster's Dictionary* and *Black's Law Dictionary*; (2) the contested policy provisions were not ambiguous or contradictory in that the "Termination" provision applied only when either defendant or plaintiff decided to cancel the policy, and the "When Insurance Stops" provision applied when the individual debtor fails to perform the necessary acts; (3) this was not a breach of contract case rather it is a case in which defendant determined that coverage did not exist under the circumstances; (4) defendant did not cancel the coverage and defendant never collected payments from Busdeker, plaintiff collected the payments from all of its debtors and forwarded one monthly check for the lot of them; and (5) defendant was not notified by plaintiff that Busdeker was in arrearage and plaintiff is the only entity that would know such information.

Following oral arguments, defendant's motion for summary dismissal was granted. The trial court noted that at issue was a group credit life insurance policy issued to plaintiff and plaintiff was provided the policy; whether plaintiff gave copies of the policy to its debtors was plaintiff's decision, not defendant's burden. Further, plaintiff's counsel admitted that Busdeker's loan "was about three months and I think five or six days in arrears for a short period of time," but argued that it did not constitute a material breach of the insurance contract. The trial court rejected that argument, noting that according to the terms of the policy, "It can't be a non-material breach. It's the difference between whether there is coverage or there is not coverage.

That can't be a non-material breach." Thereafter, the trial court granted the motion for dismissal. Plaintiff's motion for reconsideration was denied, and this appeal followed.

Plaintiff argues on appeal that the trial court erroneously granted defendant's motion for summary disposition because numerous issues of fact existed, including whether Busdeker was three months or more in arrears in violation of the insurance policy terms. After review de novo to determine whether plaintiff established a genuine issue of material fact, we disagree. See MCR 2.116(C)(10); *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

Plaintiff's counsel admitted during oral arguments on the motion for summary disposition that the loan was more than three months in arrears, as quoted above. Specifically, with regard to the loan, the colloquy included:

> *Mr. Padgett*: . . . It was about three months and I think five or six days in arrears for a short period of time. We haven't denied that. The testimony of the president [of the credit union] establishes that. But our argument is –
>
> *The Court*: You mean – you denied what?
>
> *Mr. Padgett*: No, I said, Judge, we're not denying that.
>
> *The Court*: That he was –
>
> *Mr. Padgett*: He was in arrears –

However, on appeal, plaintiff is attempting to argue the loan was *not* in arrears 3 months, but was only in arrears 2.8 months. But, it is well-established that a party cannot take a position in the trial court and then take a contrary position on appeal. See *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). Therefore, plaintiff's argument that the loan payments were not 3 months delinquent is rejected. And, the policy clearly provides that "Insurance stops . . . (6) on the last day of the month in which the Debtor is 3 months delinquent in any payment on his loan." Insurance policy language must be interpreted as written and according to its plain meaning. *American Bumper & Mfg Co v Nat Union Fire Ins Co*, 261 Mich App 367, 375; 683 NW2d 161 (2004). Therefore, the trial court properly determined that this policy term was triggered by Busdeker's delinquency.

Plaintiff also argues, however, that defendant should be estopped from defending the claim on the ground that the delinquency terminated the coverage because defendant did not provide notice of the terms of the policy to Busdeker. We disagree. As the trial court noted, the insurance policy was a group credit life insurance policy. Apparently, plaintiff recommended that its debtors secure the coverage, which names plaintiff the beneficiary. See MCL 500.4416. Plaintiff is the group policyholder. See MCL 500.4418. The group life insurance policy refers to plaintiff as the "creditor" and provides as follows: "The Creditor shall deliver to each insured Debtor an Individual Certificate furnished by the Company describing the coverage to which the insured Debtor is entitled under this policy." Therefore, as the policyholder and according to the clear terms of the policy, it was plaintiff's responsibility to provide Busdeker with notice of the life insurance policy terms. Thus, this argument is without merit.

And, we reject plaintiff's argument that defendant should be estopped from defending the claim because it continued to accept premiums for coverage. In fact, plaintiff continued to accept premiums from Busdeker for the life insurance policy. The group policy provides that "Premiums under this policy . . . shall be paid to the Company [defendant] by the Creditor [plaintiff] at the same time the Creditor shall furnish the Company with reports and information required pursuant hereto." And, the policy required that plaintiff maintain a record regarding the debtor insured, including the amounts of their indebtedness, cancellations, changes, and additions. In light of plaintiff's collection of both the loan payments and the insurance premium payments, plaintiff knew or should have known that Busdeker may not have been eligible for coverage and, as policyholder, should have advised Busdeker of the same. Nevertheless, defendant may not retain the unearned premiums; therefore, we remand this matter to the trial court for determination of the amount of reimbursement, including interest, to which Busdeker's widow may be entitled. See MCR 7.216(A)(7).

We decline to address plaintiff's argument that the trial court should not have summarily dismissed this matter on the ground that Busdeker's loan was renewed because the trial court made no findings on the issue and did not dismiss this matter on that ground.

Affirmed but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter